The last two grounds of appeal deal with the evidence in general. It is said that the learned judge erred in law and fact in rejecting the evidence of the defendant and of his witnesses, and that in any event his findings are unreasonable. In my opinion, these two grounds are entirely frivolous. Having seen and heard the witnesses for both sides, the learned judge had the advantage, which this court cannot possibly have, to evaluate such evidence and to arrive at his conclusions on that evidence. It would seem clear to me that there was overwhelming evidence in support of the conclusions at which he arrived on questions of fact.

I would dismiss the appeal with costs.

Suffian and **Ong Hock Sim F.JJ.** concurred.

Solicitors: *A. K. J. D'Cruz & Co.; Murphy & Dunbar.*

ANNA JONG YU HIONG v. GOVERNMENT OF SARAWAK

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) August 30, 1972]

[Kuching — Federal Court Civil Appeal No. 89 of 1971]

Damages — Assessment — Fresh evidence on future loss — Admission of, by Federal Court — Pension under Widows' and Orphans' Pensions Ordinance (Sarawak Cap. 90) — Whether consideration to be taken.

Practice and Procedure — Costs — Success on point not raised at trial — Award on appeal exceeding deposit in court.

This was an appeal by the plaintiff against an award of damages by the High Court ([1972] 1 M.L.J. 103).

It was agreed at the trial and repeated in the grounds of appeal that the deceased had a chance of further promotion after reaching the maximum at $350. At the hearing of the appeal, the Federal Court admitted fresh evidence namely, an "offer of conversion to the clean wage system" recommended by the *Suffian* Salary Commission. On this scale the deceased should have reached the maximum of the scale at $425 after 10 years' service.

Another issue for determination was whether the monthly pension of $110.27 which the appellant had been receiving under the Widows' and Orphans' Pensions Ordinance, since the death of the deceased, should be taken into account.

Held: (1) the loss of future income must be reassessed on the basis that the deceased would continue to be in the same post but on the new timescale, until his retirement at the age of 55;

(2) the pension of $110.27 should not be taken into consideration;

(3) on that basis and assessing it on the new salary scale but using the trial judge's method of calculation, the general damages, after the necessary deductions, must be assessed at $43,000, which was to be apportioned accordingly between the widow and the two infants. The damages due to the two infants must be paid to the Public Trustee;

(4) since the appellant had succeeded on a point not raised in the court below, and since she was only partly successful in this appeal, no costs were to be awarded. With regard to costs in the court below, since the amount awarded on appeal exceeded the amount deposited by the respondent in court, the appellants were to have the costs in the court below.

Cases referred to:-

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at p. 606.

(2) *Parry* v. *Cleaver* [1969] 1 All E.R. 555 at p. 560.

(3) *Mallet* v. *McMonagle* [1969] 2 All E.R. 178.

(4) *Hussey* v. *Horne-Payne* (1878) 8 Ch. D. 670 at p. 679.

FEDERAL COURT

T. O. Thomas for the appellant.

Denis Ong Jiew Fook (State Counsel) for the respondent.

Azmi L.P.: This is an appeal by the plaintiff against an award of damages made by the High Court at Kuching.

The plaintiff as the widow and the administratrix of the estate of her husband, sued her husband's employer, the Government of Sarawak for loss of support under the Fatal Accidents Acts and also for damages under the Law Reform (Miscellaneous Provisions) Act 1934 on the ground that her husband was killed by the negligent act of another Government employee. The defendant admitted negligence. So the learned trial judge proceeded with the case on the question of damages only. The learned judge made the following awards in favour of the plaintiff and her two children: -

(1) $1,000 for funeral expenses.

(2) General damages — $21,758.72 cts to be apportioned on the following basis:—

Widow	—	$14,505.82
First Child Second Child	)	$ 7,252.90

By reason of section 2 of the Application of Laws Ordinance of Sarawak (Cap. 2) the following laws of the United Kingdom as on 12th December 1949 would be applicable to this case: (i) The Fatal Accidents Act 1846, (ii) Fatal Accidents (Damages) Act 1908, (iii) Law Reform (Miscellaneous Provisions) Act 1934, (iv) Law Reform (Contributory Negligence) Act of 1945 and (v) Law Reform (Personal Injuries) Act 1948. In the result section 40 of the Widows, Orphans and Old Age Contributory Pension Act of 1936 did not apply. That section provides that in assessing damages in any action under the Fatal Accidents Act 1846 to 1908, whether commenced before or after the commencement of the Acts, any widows' pension, additional allowance or orphans' pension payable under the Acts shall not be taken into account.

I will now refer to the relevant facts of the case which are not disputed. The deceased at the time of his death was an Overseer Artisan Grade I employed in the Public Works Department of Miri, Sarawak. He was 29 years of age and on his death left the plaintiff as his widow and two children, then aged 16 months and 6 months respectively. At that time his salary was $230 p.m. on a timescale of $230 x 10 – $350. If he should continue to live and remain in the service of the Government he would at the end of 8 years reach the maximum of the scale at $350.

It was argued at the trial and repeated in the grounds of appeal that the deceased would have a

chance of further promotion after reaching the maximum at $350. There is for instance, a post called Foreman/Chargeman Grade II on a timescale of $370 x 20 – $410 and Grade I on a salary scale of $430 x 20 – $620 to which post he would have a good chance of promotion. Indeed it was also argued before us that the deceased would have gone further namely to the post of Works Superintendent on a salary of $690 x 30 – $1,050. At the hearing of the appeal we had admitted fresh evidence namely an "offer of conversion to the clean wage system" recommended by the *Suffian* Salary Commission. That document was dated 14th January 1972 and addressed to the deceased. By that time he was already dead 3 years. There is no doubt that the deceased would have accepted this offer as many other Government servants have already done. It was agreed also by counsel for the Government of Sarawak that the question of loss of support should be re-assessed on the new salary scale. This new clean wage salary scale is $285 x 10 – $325; 350 x 15 – $425. On this scale the deceased would have reached the maximum of the scale at $425 after 10 years' service. Mr. Michael Parker the Divisional Engineer and deceased's superior officer gave evidence on behalf of the plaintiff. He said that the deceased started work in 1958 as a daily paid worker and on 14th April 1967 he was placed on probation in the post he held at the time of his death. This was done through the recommendation of Mr. Parker. Mr. Parker had a very high opinion of the deceased. He explained that to become Mechanical Superintendent or Works Superintendent, the deceased had to overcome two hurdles. He had to be promoted first after reaching the maximum on the scale he was on at the time of his death to the scale of Foreman/Chargeman Grade II and then Grade I. To be Foreman/Chargeman Grade II from Overseer Artisan Grade I it will take 7 years and about the same period from there to become a Chargeman Grade I. The Mechanical Engineers are qualified either by a professional diploma in mechanical engineering or a university degree. That post is in Division I of the service. He also told the Court at the trial first that the State Secretary of Sarawak would not entertain accelerated promotion and again a promotion would depend on a vacancy and there would be, no doubt, other candidates for promotion to Foreman/Chargeman Grade II from Overseer Artisan Grade I.

In answer to cross-examination Mr. Parker went on to say that the deceased was on a 36 months' probation at the time of his death and only at the termination of that period would he be considered by the Establishment Officer whether he should be confirmed in that post, and he had to say that the Establishment Officer need not necessarily abide by his (witness') recommendation for that purpose.

The learned judge assessed the prospect of deceased's future income on the basis that he would continue to remain in the post of Overseer Artisan Grade II until his retirement at the age of 55. I do not see why we should interfere with this finding of facts. In the circumstances I would therefore reassess the loss of future income on the basis that the deceased would continue to be in the same post but on the new timescale until his retirement at the age of 55. Before I do that, however, I would deal with the question whether the monthly pension of $110.27 which the plaintiff had been receiving under the Widows' and Orphans' Pensions Ordinance (Cap. 90) since the death of the deceased should be taken into account.

On the question as to what should be taken into account in regard to assessment of damages under the Fatal Accidents Act, Lord Russel of Killowen in *Davies* v. *Powell Duffryn Associated Collieries Ltd.*[1] set out the principle in the following terms: —

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately.

It is rightly conceded that the general rule must apply unless statutory exception to it prevents its application. There are two well known instances in which such statutory exception has been enacted. One is the case of life insurance, as to which the Fatal Accidents (Damages) Act 1908 section 1 enacts 'In assessing damages in any action whether commenced before or after the passing of this Act under the Fatal Accidents Act 1846 as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance whether made before or after the passing of this Act.' The other relates to pensions as to which the Widows and Orphans and Old Age Contributory Pensions Act 1936 (re-enacting section 22 of the Act of 1929) provides by section 40 that: 'In assessing damages in any action under the Fatal Accidents Act 1846 to 1908 whether commenced before or after the commencement of this Act, there shall not be taken into account any widows' pensions, additional allowance or orphans' pensions payable under this Act'."

The Widows' and Orphans' and Old Age Contributory Pension Act of the United Kingdom though enacted in 1936 was not, as I have said before, brought into force in Sarawak. Another unfortunate coincidence for the widow is this. An amendment to the law (see Civil Law Ordinance (Extension) Order 1971) which provides that in assessing damages for loss of earnings or support occasioned by the death of a person, any pension or gratuity will not be taken into account, only took effect after the date of the accident in this case.

In the circumstances the learned judge after assessing the loss of support deducted (1) the pension which the plaintiff had been receiving under the Sarawak Widows and Orphans Pensions Ordinance (Cap. 90) amounting to $110.27 (2) the gratuity amounting to $2,760 under the Sarawak Pensions Ordinance and (3) $2,000 accelerated payment from the husband's estate. It is not disputed that the learned judge was right in deducting the last two figures.

In reference to the first figure it was argued before us that this pension is in the nature of a payment under a contract of insurance and therefore should not be taken into account as provided in section 1 of the English Fatal Accidents (Damages) Act 1908 which applies to this case. In support of this argument, counsel for the plaintiff cited before us the following opinion of Lord Reid in *Parry* v. *Cleaver*[2]:

"The products of the sums paid into the pension fund are

in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.

But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance what he gets back depends on how things turn out. He may never be off duty and may die before retiring age leaving no dependants. Then he gets nothing back. Or he may by getting a retirement or disablement pension get much more back than has been paid in on his behalf. I can see no relevant difference between this and any other form of insurance. So, if insurance benefits are not deductible in assessing damages and remoteness is out of the way, why should he pension be deductible?"

It is apparent to me that what Lord Reid said in that passage in reference to a pension payable under the Police Pensions Regulations 1962 could indeed be equally said in respect of a pension under the Sarawak Ordinance. I would therefore agree with counsel's contention that the pension of $110.27 should not be taken into consideration.

On that basis and assessing it on the new salary scale but using the judge's method of calculation, I would assess the dependency figure for both the widow and two infants at $50,760 and deducting therefrom the gratuity of $2,760 and the accelerated payment of $2,000, the net amount due would be $46,000 The learned judge took out of this amount $3,000 being a figure which he allowed for loss of expectation of life, but, however, he omitted to make a further order for which the plaintiff also made a claim for payment by the defendant to the deceased's estate. In assessing the loss of dependency, the learned judge utilised the method set out by Lord Denning in the House of Lords case of *Mallet* v. *McMonagle*.[3]

In the circumstances I would substitute for the orders of the learned judge the following: —

General damages $43,000 to be apportioned as follows: —

To the widow	- - -	$28,667.00
To first child	- - -	$ 7,166.50
To second child	- - -	$ 7,166.50
To the estate	- - -	$ 3,000.00

There is also an appeal against the award of $1,000 for funeral expenses. In my view this is a fair amount and should not be disturbed.

On the question of costs Mr. Thomas should have brought to the notice of the court below the case of *Parry* v. *Cleaver*. He had therefore succeeded on a point not raised in the court below. As Cotton L.J. in *Hussey* v. *Horne-Payne*[4] said: —

"As our decision in favour of the defendant turns upon a point not raised by him in the court below, I agree with what the Master of the Rolls has said as to the costs."

And the Master of the Rolls Jessel M.R. disallowed costs of the appeal. Again in this appeal the appellant was only partly successful. That is another good reason for disallowing the costs of this appeal.

As to costs in the court below, the learned judge disallowed the costs because the amount awarded by him was less than the amount deposited by the defendant in court before the commencement of the trial and now that the amount we award exceeds the deposit the plaintiff should have the costs in the court below. Her deposit of $500 will be repaid to her.

Now if I may go back to the award I would order that the damages due to the two children be paid to the Public Trustee to hold the same in trust for the two infants.

Ismail Khan C.J. (Borneo) and **Ali F.J.** concurred.

Order accordingly.

TAN AH SEH v. TAN PEK SUI

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Ali F.J.)

August 30, 1972]

[Kuching — Federal Court Criminal Reference No. 2 of 1972]

Landlord and Tenant — Subletting — Particulars of — Request from tenant for particulars of subletting — Whether notice sufficient — Rent Control Ordinance (Sarawak Cap. 86).

The respondent landlord sent a notice to the appellant, his tenant, requiring him to furnish a declaration whether he had sublet the premises in question, and if so particulars in respect of such subletting, and to exhibit a statement thereof in a conspicuous place at the premises. The appellant failed to furnish the required declaration and he was charged for an offence under section 17(2) of the Rent Control Ordinance (Cap. 86), and was convicted and fined.

In this reference the appellant sought for a decision of the Federal Court a question law of public interest, i.e. whether the notice given by the landlord was a valid notice under section 17(1) of the Rent Control Ordinance having regard to the fact that the said notice neither referred to the Rent Control Ordinance nor set out in full the provisions of section 17 of the said Ordinance.

Held: (1) there is no prescribed form in the Rent Control Ordinance and therefore the notice need not follow any particular form;

(2) in the instant case the notice was a perfectly valid notice.

Case referred to:-

(1) *Arunachalam Chettiar* v. *Kow Guan* [1963] M.L.J. 253 at p. 256.

FEDERAL COURT.

T. O. Thomas for the appellant.

Patrick Tan for the respondent.

Ismail Khan C.J. (Borneo): This is a reference to this court under section 66 of the Courts of Judicature Act, 1964 on the application of the appellant reserving for the decision of this court a question of law of public interest; the question being whether the notice given by the landlord (Exhibit P.3) was a valid notice under section 17(1) of the Rent Control Ordinance (Sarawak Cap. 86) having regard to the fact that the said notice neither referred to the Rent Control Ordinance nor set out in full the provisions of section 17 of the said Ordinance.

The section reads —

"17.—(1) The landlord of any premises, or his agent, may by written notice require any tenant thereof —

(a) to furnish to the landlord of the premises a statutory declaration, which shall be prepared and stamped at the cost of such landlord, stating whether the tenant has sublet the